

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-2130

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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ROBERT BROWN,

Petitioner-Appellant

-against-

MELVYN TANENBAUM, a Judge of the County Court of
the State of New York, Suffolk County, HENRY F.
O'BRIEN, District Attorney of Suffolk County,
BENJAMIN WARD, Commissioner of Corrections of the
State of New York, and the SHERIFF OF THE COUNTY
OF SUFFOLK,

ORIGINAL

Respondents-Appellees

BRIEF FOR RESPONDENTS-APPELLEES

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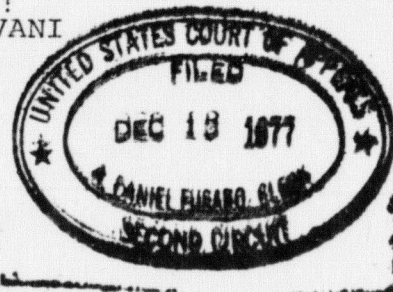


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-against-

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the State of New York, Suffolk County, HENRY F.
O'BRIEN, District Attorney of Suffolk County,
BENJAMIN WARD, Commissioner of Corrections of the
State of New York, and the SHERIFF OF THE COUNTY
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Respondents-Appellees

BRIEF FOR RESPONDENTS-APPELLEES

PRELIMINARY STATEMENT

This is an appeal from an order of the United States District Court for the Eastern District of New York (Pratt, J.) dismissing petitioner ROBERT BROWN'S request for federal habeas corpus relief from a judgment, after a plea of guilty, rendered on April 2, 1976 by the County Court of Suffolk County, New York (Tanenbaum, J.), convicting him of the crimes of Obscenity in the First and Second Degree and sentencing him to an indeterminate term of imprisonment with a maximum of three years with respect to the former charge and to a term of sixty days on the latter, to run concurrently. Petitioner has not commenced serving that sentence.

INTRODUCTION

Petitioner has been convicted for the admitted violation of New York Penal Law §235.00 which has been consistently held to be constitutional, and whose language is neither vague on its face nor has it been applied unforeseeably or retroactively.* His plea of guilty was accepted by the trial court only after a thorough and searching inquiry, in the course of which petitioner admitted every element of the crimes charged including his present belief that the publications upon whose sale his conviction is based were obscene under the applicable Roth-Memoirs**test promulgated by the Supreme Court.

Petitioner has sought federal habeas corpus relief from these convictions, urging a review of the obscenity vel non of the magazines. Upon this appeal respondent will argue that the District Court's dismissal of his petition was correct since, contrary to his assertion, petitioner was afforded an adversarial hearing on the issue of obscenity upon his initial specific request, and because his voluntary guilty plea renders the alleged antecedent

* People v. Heller, 33 N.Y.2d 314, 327-328 (1973); in general, see Point III, *infra*, pp.

** Roth v. United States, 354 U.S. 476 (1957); Memoirs v. Massachusetts, 383 U.S. 413 (1966).

constitutional infirmities irrelevant. Respondent will also contend that the District Court properly interpreted the order of the trial court sought to be relied on by petitioner in urging that his plea was conditioned on the reservation of his right to appeal, since that order recognizes, at best, that the express reservation of such right is possible if clearly understood by all parties, and is, otherwise, a clear misstatement of New York law.

Respondent will further urge, should this Court decide to entertain petitioner's appeal on the merits, that the materials are obscene under the applicable criteria, and that the unambiguous nature of petitioner's plea allocation and the total absence of a tri-partite agreement concerning the conditional nature of that plea obviate the necessity for inquiring into the understanding with which the plea was entered.

Finally, respondent will argue that the statute violated by petitioner is constitutional as written and authoritatively construed by the New York Court of Appeals in Heller, supra, where that Court correctly held that the specificity requirements of Miller* had been satisfied by the prior consistent judicial construction of the plain language of the statute by the courts of New York State.

* Miller v. California, 413 U.S. 15 (1973)

STATEMENT OF FACTS

On March 22, 1972, following an ex parte determination that certain magazines were obscene under the standards delineated by Section 235.00 of the New York Penal Law, Judge Frank L. Gates of the County Court, County of Suffolk, issued a search warrant directing the seizure of six copies of each such magazine.

On April 28, 1972 petitioner and three individual and corporate codefendants were indicted by the Grand Jury of Suffolk County under Indictment Number 555-72 and charged with Conspiracy in the Fourth Degree, Conspiracy in the Third Degree, Obscenity in the First Degree and Obscenity in the Second Degree in a 207 count indictment.*

During the five year period between the commencement of this criminal proceeding and the date sentence was imposed, petitioner interposed the following written pre-trial motions:

- (1) July 12, 1972 - motion to controvert the search warrant and suppress the evidence based, inter alia, on the failure to afford petitioner a adversary proceeding prior to issuance to determine the question of obscenity. (S.A. 1). Significantly, the Memorandum of Law in support of the motion contains one of petitioner's only two written requests

* By an order of the County Court (Tanenbaum, J.) dated October 17, 1975, 105 counts of the indictment were dismissed.

for a hearing, and that only for the limited purpose of ascertaining "whether there was prior judicial scrutiny so as to constitute probable cause for the issuance of the warrant". (S.A. 9, emphasis supplied).

September 20, 1972 - motion denied (S.A. 21).

- (2) September 28, 1972 - motion to reargue denial of prior motion to controvert and suppress, reiterating the request for a hearing on the issue of prior judicial scrutiny. (S.A. 26, 30).
November 14, 1972 - motion denied (S.A. 31).
- (3) November 29, 1972 - motion to inspect Grand Jury minutes, dismiss indictment, obtain bill of particulars and discovery and inspection.
March 8, 1973 - motion denied (Lundberg, J.).
- (4) Undated - motion to dismiss the indictment based, inter alia, on the lack of judicial scrutiny prior to issuance of the warrant, non-obscenity of the materials, unconstitutionality of the statutes violated and insufficiency of the indictment. (A. 16).
May 8, 1973 - motion denied, pursuant to Criminal Procedure Law §210.20(3). (A. 18).
- (5) May 2, 1973 - motion to reargue denial of previous motion to dismiss indictment, arguing that sufficiency of evidence before the Grand Jury is not reviewable on appeal following conviction after trial (A. 19).
May 23, 1973 - denial of motion in opinion suggesting that appeal of sufficiency question is possible after a guilty plea (A. 22).

- (6) November 16, 1973 - motion to declare Article 18, Sections 662, 664, 665, 665-a and 684 of the New York Judiciary Law, pertaining to the manner of jury selection, unconstitutional and requesting a hearing.
January 15, 1974 - motion denied (Gates, J.).
- (7) September 7, 1973 - motion to declare Penal Law Section 235.00 et seq. unconstitutionally broad and vague.
October 11, 1973 - motion denied (Lundberg, J.).

During the week preceding the entry of petitioner's plea of guilty the trial court conducted a lengthy pre-trial hearing, in the course of which petitioner, for the first time, requested a hearing relative to the issue of the obscenity vel non of the materials in question. Following a fully adversarial proceeding the court held that the publications were obscene. (S.A. 81). Following that determination, more than two years after the decision by Judge Lundberg [Motion (5), supra, A. 22] he now suggests he was relying on, petitioner pleaded guilty to two counts in full satisfaction of the remaining 102 counts of the indictment.

The Appellate Division of the Supreme Court of New York unanimously affirmed petitioner's conviction (A.9) and leave to appeal to the New York Court of Appeals was denied by a Judge of that Court. His subsequent petition for a writ of habeas corpus was dismissed by the District Court (Pratt, J.).

POINT I

IN THE ABSENCE OF STATUTORY AUTHORITY OR AN EXPRESS RESERVATION OF THE RIGHT TO APPEAL CLEARLY UNDERSTOOD BY ALL PARTIES, THE ISSUE OF THE OBSCENITY VEL NON OF THE MAGAZINES IS NOT REVIEWABLE BY THIS COURT.

The general rule, recognized by appellant (Brief, p.9), is that a guilty plea entered by an accused knowingly, willingly and with the benefit of competent counsel constitutes a waiver of all pre-existing non-constitutional defects. The rationale for this rule has been variously stated. Thus, in Tollett v. Henderson, 411 U.S.256 (1973), the Supreme Court, in reaffirming its previously stated views, noted:

[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. (id, 411 U.S. at 267).

More recently, in Menna v. New York, 423 U.S. 61 (1975) the Court clarified the view expressed in Tollett that "waiver" is not the sole ingredient of this type of case:

The point...is that a counseled plea of

guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly, removes the issue of factual guilt from the case. In most cases factual guilt is a sufficient basis for the State's inposition of punishment. A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established. (Menna, supra, at 62, n.2 emphasis in original)

While this latter view, of course, represents a change in emphasis, it is apparent that it works no practical change from the previously stated general rule, since the Court's holding makes it clear that "constitutional violations...inconsistent with the valid establishment of factual guilt" are the functional analogs of jurisdictional defects. Thus, whether viewed in terms of "classic" waiver, "an intentional relinquishment or abandonment of a known right or privilege", [Johnson v. Zerbst, 304 U.S. 458, 464 (1938)], or in terms of a constitutional preclusion "from haling a defendant into court on a charge", (Menna v. New York, supra, 46 L. Ed. 2d at 197] the focus in determining whether an alleged antecedent constitutional violation is preserved for appellate review once defendant has entered an intelligent plea of guilty depends on whether or not the

particular infirmity is jurisdictional in the sense that it destroys the predicate for the valid establishment of factual guilt.

Petitioner's initial contention that obscenity cases do not readily fit into this scheme since "'factual guilt' rarely plays any part in their ultimate resolution" (Brief, p. 10) is palpably without merit. At the time relevant to this inquiry the crime of Obscenity in the First Degree, as defined by Section 235.07 of the New York Penal Law, consisted of three elements: (1) wholesale promotion, of (2) obscene material, with (3) knowledge of its content. The minutes of petitioner's plea allocution clearly demonstrate that not only did he admit the sale of the magazines and full familiarity with their content, as he concedes (Brief, p. 11), but that he also repeatedly acknowledged that the publications were obscene under the applicable Roth-Memoirs test. Specifically, petitioner signified his awareness that his plea of guilty constituted an admission that he had committed the crime charged (S. A. 93); that he understood that his plea was the equivalent of a conviction after trial (S. A. 94); and that although he did not consider the magazine obscene at the time the crime charged was committed* (S.A. 100,106),

* It is clear that an accused's contemporaneous belief that the materials he is selling are not obscene is not an element of the offense. See, e.g., Hamling v. United States, 418 U. S. 121, 119-124 (1974).

he now believed them to be obscene since they have a predominant appeal to an interest in sex, have no socially redeeming value and go beyond the customary limits of candor (S.A. 100, 101, 102, 103, 106). Thus the plea minutes unequivocally indicate petitioner's awareness of the well settled principle that "[a] plea of guilty differs in purpose and effect from a mere admission or an extra-judicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive." Kercheval v. United States, 274 U.S. 220, 223 (1927).

Moreover, such a plea

"operates as an admission of all material facts alleged in the count or counts pleaded to, and thus dispenses with the need to prove them. More important, however, is the effect of the plea beyond this service to the Government. '...it is the defendant's consent that judgment of conviction may be entered without a trial-a waiver of his right to trial before a jury or a judge.' Coleman v. Burnett, 477 F. 2d 1187, 1193 (1973) citing Brady v. United States, 397 U.S. 742, 748 (1970), emphasis supplied.

Thus, while petitioner correctly observes that the issue of obscenity vel non is ultimately one of constitutional law with respect to which a jury's finding does not have its usual conclusive effect [United States v. A Motion Picture Film Entitled "I Am Curious-Yellow", 404 F.2d 196, 199 (2nd Cir. 1968)] he erroneously attempts to equate

the phrase "issue of fact" in that decision with the words "factual guilt" in Menna, supra. It is clear, however, that the Supreme Court in Menna employed the latter phrase as a shibboleth to distinguish the question of the establishment of the elements of the crime charged, whether following trial or a guilty plea, from the resolution of a threshold jurisdictional issue which would preclude the prosecution from haling a defendant into court in the first instance. It is respectfully submitted, therefore, that the petitioner's specific acknowledgment of the obscenity of the books in question, one of elements of the crime charged and part of the factual averments of the count he pleaded to (See Coleman, supra), must be deemed a valid and proper determination of the obscenity vel non of the materials.

Petitioner apparently concedes that prior to the Supreme Court's decision in Heller v. New York, 413 U.S. 483 (1973) there was no requirement that an adversarial proceeding to determine the obscenity vel non of seized materials be afforded a defendant prior to trial*. (Brief, pp.11,12).

* Petitioner correctly notes that the trial court's summary denial of his motion to reargue his prior motion to dismiss the indictment based on the alleged insufficiency of the evidence presented to the Grand Jury pre-dated Heller by approximately a month.

Initially it should be noted, petitioner's assertions to the contrary notwithstanding, that he was afforded a fully adversarial hearing to determine whether the seized articles were obscene. The Court afforded trial counsel wide latitude with respect to the scope of the proceeding (S. A. 41). Petitioner's attorney addressed himself to several of the publications individually (S. A. 49, 59, 60, 61), applying the then applicable Roth-Memoirs test, citing decisions in other jurisdictions involving some of the exhibits before the Court (S.A. 75, 77, 78) and furnishing the Court with a copy of a book entitled the "Joy of Sex" in an attempt to analogize the materials in question to that "best-seller" and to establish current community standards. The only real limits on the scope of the hearing were self-imposed (S.A. 62) and counsel for petitioner's co-defendant were similarly permitted to analyze the publications individually (S.A. 62-71). Five days after the hearing the Court rendered an oral decision denying petitioner's motion to dismiss the indictment, holding that the evidence before the Grand Jury was sufficient to support the indictment (S.A. 81) and that the materials seized were obscene (S.A. 84).

Moreover, as previously noted, the right to an adversarial proceeding to determine obscenity was created after the denial of petitioner's initial series of pre-trial motions. It is respectfully submitted that pursuant to

the guidelines enunciated by the Supreme Court in Johnson v. New Jersey, 384 U. S. 719 (1966) and Stoval v. Denno, 388 U. S. 293 (1967) the holding of Heller, supra, must be given prospective effect only.

The Supreme Court in Heller created a new constitutional safeguard in a sensitive area which is substantively and analytically procedural in nature. The prophylactic purpose of affording an opportunity for prompt determination of the question of obscenity of seized materials is the elimination of the possibility of abridging or chilling First Amendment rights. The imposition of the new requirement was not readily foreseeable and the trial court was justifiably relying on Criminal Procedure Law §§210.30(4), 210.20(3), and the prior ex parte determination of obscenity by the judge who authorized the seizure in summarily denying petitioner's applications to dismiss based on the alleged insufficiency of the evidence presented to the Grand Jury. Finally, the extent to which prompt determination of the question of obscenity would enhance the reliability of the truth-finding process, especially in the case of a limited seizure for the purpose of preserving evidence involving a defendant who ultimately opts to plead guilty, is far out-weighted by the impact of retroactivity on the criminal justice system.

Finally, in Heller, the Court made it clear that the right to participate in a pre-trial adversarial proceeding

is subject to waiver by a defendant (Id, 413 U.S. at 491). In the instant case, as in Heller, petitioner made no request for a hearing relative to the question of obscenity until the eve of trial, at which time his motion was granted (S.A. 38).* Thus the interval between the seizure of the materials in question and petitioner's assertion of his right to a hearing, caused by his choice, must be excluded from any consideration of the "promptness" issue. Heller, supra, 413 U.S. at 491.

Even assuming, arguendo, that the adversarial hearing granted petitioner is found insufficient to comply with the mandate of Heller, or that the trial court's determination of obscenity is deemed erroneous, petitioner's informed and voluntary pleas of guilty constitute a waiver of such a non-jurisdictional defect. Although in obscenity prosecutions such a threshold determination is now mandated, it is obviously not conclusive upon the ultimate trier of the facts. By his guilty plea petitioner has waived his fundamental constitutional right to trial by jury [Duncan v. Louisiana, 391 U. S. 145 (1968)] and to be convicted by proof beyond all reasonable doubt [In re

* It is instructive to note that, without objection from petitioner, the Assistant District Attorney characterized the petitioner's application for a hearing with respect to the obscenity vel non of the materials as his first request for such relief. Petitioner's only two other requests for hearing were made in connection with unrelated issues (see, supra, at pp 4,5).

Winship, 397 U.S. 358 (1970)], choosing instead to accept the Court's preliminary ruling. It is clear that under Menna, *supra*, neither such constitutional violation is logically inconsistent with the valid establishment of factual guilt.

A[n obscenity] conviction after trial in which [non-obscene material] is introduced rests...on [such material], a constitutionally unacceptable basis for conviction. It is that conviction and the [constitutionally protected material] on which it rests that the defendant later attacks in collateral proceedings. The defendant who pleads guilty is in a different posture. He is convicted on his counseled admission in open court that he committed the crime charged against him. The [protected material] is not the basis for the judgment, has never been offered in evidence at a trial, and may never be offered. McMann v. Richardson, 397 U.S. 759, 773 (1970) [bracketed matter adapted to facts of case at bar].

Thus, "constitutional violations occurring in the criminal process which do not exert a causative effect upon the decision to enter a guilty plea are swallowed up by the plea and insulated from collateral attack". Parker v. Ross, 470 F. 2d 1092, 1096 (4th Cir. 1972). Petitioner's plea could not have been triggered by an alleged denial of an adversarial proceeding to determine obscenity, except in the remote sense that "but for" such denial he might not have had to decide to plead at all. See, Parker, *supra* at 1095.

With respect to the sufficiency of the evidence to support the challenged indictment it is respectfully submitted, and petitioner does not argue to the contrary, that direct as well as collateral review of the sufficiency of the evidence presented to the Grand Jury is ordinarily foreclosed by a petitioner's counseled guilty plea since "[d]efects in the grand jury process, other than failure of an indictment to state an offense, are non-jurisdictional and subject to waiver." [Parker v. Ross, 470 F. 2d 1092, 1093 (4th Cir., 1972)]. As the Supreme Court, in Costello v. United States, 350 U. S. 359 (1956), opined:

"If indictment were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed... This is not required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury...if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more." (Id., at 363).

The Supreme Court in Tollett v. Henderson, supra, held that the availability of collateral federal relief, following a counseled plea of guilty is even more severely

circumscribed than the right to direct appeal.

"[A]fter a criminal defendant pleads guilty, on the advice of counsel, he is not automatically entitled to federal collateral relief on proof of [constitutional shortcomings in the criminal process]. The focus of federal habeas inquiry is the nature of the advice and the voluntariness of the plea, not the existence as such of an antecedent constitutional infirmity. A state prisoner must, of course, prove that some constitutional infirmity occurred in the proceedings. But the inquiry does not end at that point...If a prisoner pleads guilty on the advice of counsel, he must demonstrate that the advice was not "within the range of competence demanded of attorneys in criminal cases..." [Id, at 267, citing McMann v. Richardson, 397 U.S. 759, 771 (1970); see also, Brady v. United States, 397 U.S. 742 (1970); Parker v. North Carolina, 397 U.S. 790 (1970)].

Petitioner attempts to circumvent the effect of his guilty plea by asserting that the circumstances surrounding that plea sufficiently spelled out a reservation of his right to collateral review of the sufficiency of the evidence presented to the grand jury.

Such conditional pleas "expressly reserving the point [for appellate review] accepted by the court with the Government's consent" have long been countenanced and indeed encouraged by some courts. United States v. Doyle, 348 F.2d 715 (2nd Cir., 1965); United States v. Zudick 523 F. 2d 848 (2nd Cir., 1975). In fact, New York's carefully

limited statutory equivalent of such a condition plea recently received the tacit approval of the Supreme Court in Lefkowitz v. Newsome, 420 U.S. 283 (1975):

Once the defendant chooses to bypass the orderly procedure for litigating his constitutional claims in order to take the benefits, if any, of a plea of guilty, the State acquires a legitimate expectation of finality in the conviction thereby obtained (citation omitted).

New York, however, has chosen not to treat a guilty plea as...a "break in the chain of events" with regard to certain claims raised in pre-trial proceedings... The guilty plea operates simply as a procedure by which the constitutional issues can be litigated without the necessity of going through the time and effort of conducting a trial, the result of which is foreordained if the constitutional issues can be litigated without the necessity of going through the time and effort of conducting a trial, the result of which is foreordained if the constitutional claim is invalid. The plea is entered with the clear understanding and expectation by the State, the defendant, and the Courts that it will not foreclose judicial review of the merits of the alleged constitutional violations. Lefkowitz v. Newsome, 420 U.S. at 289-290 (emphasis supplied)

That petitioner did not expressly or even impliedly reserve the right to appeal the trial court's ~~sanctions~~ of his motions is a matter not fairly open on the record. It is equally clear that no statutory "conditional guilty plea" similar to C.P.L. §710.70 (2), approved by the court in

Newsome, exists in the case of the infirmity alleged by petitioner. (See *infra*, at p. 24) A defendant may not unilaterally create such a procedure in the absence of statutory or judicial authority, nor should this court legitimize such an attempt.

N o r is it relevant that the objection sought to be reviewed was raised, but adversely determined, prior to the entry of his guilty pleas.

[T]he effect of a plea of guilty does not depend on whether an issue sought to be pressed on appeal...might have been, or was, in fact, properly raised in advance of trial. An unqualified plea of guilty, legitimately obtained and still in force, bars further consideration of all but the most fundamental premises for the conviction of which the subject matter jurisdiction of the court is a familiar example. United States v. Doyle, *supra*, at 718-719.

Further, petitioner cannot seriously maintain that his guilty plea was involuntary in the sense of being coerced by denials of their pre-trial motions. United States v. Warden of Green Haven Prison, 255 F. Supp. 33 (1966). The court in United States v. Doyle, *supra* at 719 answered the contention implicit in petitioner's position, that in the interest of judicial economy, a defendant who pleads guilty should be permitted to preserve adverse rulings for appellate review without the burden of participating in a potentially

futile trial on the merits:

The premise is sound but the conclusion does not follow. There are a number of ways to deal sensibly with such a case.. A plea expressly reserving the point accepted by the court with the Government's consent or a stipulation that the facts are as charged in the indictment are two; failing either of these the defendant can simply stand on his not guilty plea and put the Government to its proof without developing a case of his own.

Recognition of the existence of such realistic alternatives highlights the contradiction inherent in the position that, absent legislative authority or express reservation of the right of appeal clearly understood by all parties, a defendant may enter a guilty plea to two counts of a m u l t i-count indictment, negotiated in good faith with the help of competent counsel, which after all should signal the end of the criminal action, and still be free to begin an appellate process and mount a collateral attack to evade the very agreement sought by him and struck for his benefit.

Petitioner strenuously contends that, in spite of the total absence of a clear agreement at the time he pleaded guilty, the trial court's memorandum decision denying his motion to reargue his previously denied motion to dismiss the indictment somehow 'put all parties on notice that the expectation of finality which normally attaches to pleas of guilty would not attach to his plea with respect to

the issue reserved" and "that he had felt 'perfectly entitled to and legitimately did, rely on the court's interpretation of the law as set forth and memorialized in its written decision" (Brief, p. 13).

In one sense the trial court's statement can be readily harmonized with the established general rule: the Court apparently did not unilaterally intend by its decision to confer a right on petitioner not generally available following an unconditional guilty plea; rather, the Court's observation merely concerned a potential right to appellate review which, however, failed to ripen into actuality because petitioner neglected to negate the People's legitimate expectation of the finality of the plea by an express reservation of that right on the record.

Alternatively, in a literal sense Judge Lundberg's decision is incorrect and it is respectfully submitted that the portion of the decision suggesting that petitioner could appeal the sufficiency of the evidence presented to the Grand Jury following a guilty plea constituted a clear misstatement of the applicable law with respect to a right generally deemed waived by the entry of a counseled guilty plea, which could not have given rise to a legitimate expectation on petitioner's part that his subsequent plea would not foreclose appellate review on the issue of the sufficiency of grand jury evidence. See, Smith v. United States, 427 F. Supp. 20, 24

(E. D. N. Y., 1976).* Petitioner's protestations to the contrary are difficult to credit since the first time he asserted his "justifiable reliance" on this one of at least eight memorandum decisions, issued by the trial court exactly twenty eight months prior to his plea of guilty, was in the course of the District Court proceeding twenty months after his plea. Moreover, the suggestion that the District Attorney's failure to challenge an order and decision which was, after all, decided in the People's favor, somehow fostered such an expectation on his part, borders on the frivolous. Finally, contrary to petitioner's averment, respondents' understanding of the import of Judge Lundberg's order is highly relevant. As noted earlier, the express reservation of the right to appeal following a guilty plea is a tri-lateral agreement which must be clearly understood by all parties and may not be created unilaterally or even bi-laterally. The record of the proceedings culminating in petitioner's guilty plea belies the contention that such an agreement was reached. Although petitioner did not specifically waive his right to appeal in the course of this plea allocution [C.f., Coleman v. Burnett, 477 F. 2d 1187 (D. C. Cir., 1973)] his admission of guilt was unequivocal. (See, supra, at 9 .)

Unquestionably, where the right is reserved by express agreement or by statutory authorization, an accused is not barred by his guilty plea from seeking appellate review. "But there is an inherent conflict in the notion

* Affirmed, 550 F.2d 833 (2d Cir 1977)

that, absent such a statute...[or agreement]...an accused can intelligently waive adverse pre-plea rulings with a view to reposing litigation and still keep the issues alive on appeal." (Coleman v. Burnett, supra, at 1187). Moreover, to dignify petitioner's suggestion that an erroneous statement of the law by the court can, per se, give rise to a full expectation that further judicial review would not be foreclosed by his guilty plea would, in large measure, obviate the necessity of legal representation for an accused. As the Supreme Court noted in Tollett v. Henderson, supra, the faithful representation of the interests of the accused is primarily the concern of his counsel.

In suggesting that New York courts have in the past examined the sufficiency of grand jury evidence on an appeal following a plea of guilty, petitioner reliance on People v. Schifter, 34 A.D.2d 561 (2nd Dept. 1970) is misplaced. In Schifter the Court relied on People v. Jackson, 18 N.Y. 2d 516 and People v. Baranello, 24 A.D.2d 637 for authority to reexamine the evidence presented to the Grand Jury. The latter case, in turn, rests on New York Court of Appeals' decision in People v. Randall, 9 N.Y.2d 413 (1961) which reaffirmed that Court's prior holding in People v. Nitzberg, 289 N.Y. 523 (1943). However, Section 210.30(6) of the New York Criminal Procedure Law, which became effective on September 1, 1971, two years before the decision in question,

expressly overruled the principle embodied in both Jackson and Nitzberg, supra [C.P.L. §210.30(6), McKinney's Consolidated Laws, Practice Commentary by Richard G. Denzer]. Thus, Jackson, Nitzberg and their progeny, including Schifter, cannot be considered controlling authority for the decision in question. Moreover, although C.P.L. §210.30(6) refers specifically to convictions after trial, it is respectfully submitted that its mandate applies even more forcefully to convictions based on a guilty plea which rests on an unequivocal admission that petitioner committed every element of the crime charged and amounts to a consent that a judgment of conviction be entered without a trial.

Petitioner's tortuous attempt to analogize a motion to controvert the sufficiency of Grand Jury evidence to an application to suppress illegally seized evidence lacks even surface conceptual plausibility. As the Supreme Court noted in Heller, supra, 413 U.S. at 488-489, the validity of the initial seizure does not depend in any respect on the outcome of a subsequent adversarial proceeding to test the obscenity of the materials but rather on whether a "neutral, detached magistrate...had a full opportunity for judicial determination of probable cause prior to issuing the warrant..." (emphasis supplied). That mandated proceeding, which was undertaken the first time petitioner actually requested

it, simply superimposes an additional procedural mechanism to safeguard sensitive first amendment rights, and even a determination that the materials seized are constitutionally protected - which was not reached here - would not invalidate the initial seizure. While a warrant aimed at obscene materials does implicate both First and Fourth Amendment rights, the framework for vindicating those rights embodies completely distinct procedural stages which impose progressively more stringent burdens of proof on the prosecution. As petitioner notes "the pure issue of obscenity vel non bears no relationship to the policy considerations underlying the Fourth Amendment's exclusionary rule." (Brief, p. 14) Given that basic dichotomy of purpose, it is clear that C.P.L. §710.70(2) which only preserves the option to appeal adverse decisions affecting Fourth Amendment rights (C.P.L. §710.20) cannot benefit petitioner.

Petitioner's unequivocal plea of guilty forecloses his challenge of the sufficiency of the evidence upon which his indictment was predicated. Although the question of obscenity is one to be resolved initially by the trier of fact [Miller v. California, 413 U. S. 15 (1973); Hamling v. United States, ____ U. S. ____, 21 Cr. L. 3051 (1977)], petitioner, by his specific waiver of his fundamental constitutional right to trial by jury and to be convicted by proof beyond a

* Interestingly enough, at one time petitioner himself seems to have understood this distinction (S. A. 9, noted supra, at p. 5).

reasonable doubt (Appendix, p. 93, 94), opted to rely on the dual threshold determinations of obscenity made by the judge who issued the search warrant and by the County Court following an exhaustive pre-trial hearing.

While petitioner's choice to plead guilty to two of one hundred and three counts still outstanding was undoubtedly motivated in part by his estimation of the likelihood that a jury would ratify the Court's preliminary determination, "[i]t strains logical consistency and legal definition to allow appeal from such a situation. The [petitioner] clearly want[s] to have [his] cake while preserving [his] rights to eat it at some future date" United States v. Cox, 464 F. 2d 937 (6th Cir., 1972)].

POINT II

AS A MATTER OF CONSTITUTIONAL LAW,
THE MAGAZINES IN QUESTION WERE
OBSCENE.

In the event that this Court decides to entertain petitioner's claim on the merits, it is respectfully submitted that the publications in question are obscene under New York State Penal Law §235.00 as written and authoritatively construed and, therefore, the evidence presented to the grand jury formed a sufficient basis for the indictment against Mr. Brown.

Both magazines are patently composed for the prurient interest market and consist of photographs of a variety of actual ultimate heterosexual and homosexual acts, in most cases with genitals prominently and lewdly displayed. Their only relationship to a "manual" (Brief, at p. 18) is their portability (see, Webster's Third New International Dictionary, G. & C. Merriam Co., Springfield, Mass., 1976). The attempt to interject elements of pseudoscientific material which, although generally innocuous in itself, simply bears no direct relationship to the collection of photographs and makes no reference to specific illustrations, should not be allowed to shield them from condemnation. As the New York State Court of Appeals stated in People v. Heller, 33 N. Y. 2d 314 (1973):

The "utterly lacking" test was abandoned in Miller because of the difficulty in proving such an extreme. The clever pornographer need only infuse some social or political prosecution. However, this Court, as it must have when the Heller case was here before, has applied the "utterly without" test within the realm of reason. Thus, we found "Blue Movie" obscene even though the pornographic activities depicted were interspersed with some political and social dialogue. We cut through the form, as it were, to the substance...The pretense at redeeming value has been discounted when it clearly is injected as a safeguard to protect a work the focus of which is toward the prurient interest market. *Id.*, *supra*, at 332.

In applying the "utterly without test" within the realm of reason it is permissible and indeed necessary to inquire, as did Justice Brennan in Ginzburg v. United States, 383 U.S. 463 (1966) whether the "instructional" content of the materials under consideration was pretense or reality; whether it formed "the basis upon which it was traded in the market place or a spurious claim for litigation purposes." (*Id.*, at 470), since, in Judge Friendly's memorable phrase "truly pornographic [material] would not be rescued by inclusion of a few verses from the Psalms." [United States v. A Motion Picture Film, 404 F. 2d 196, 201 (2nd Cir., 1968), Friendly, J., concurring.]

While the publications entitled "Young Boys and Oral Sex" and "The Art of Cunnilingus" might not have been obscene by the "community standards of Sodom and Gomorrah", they clearly violated P.L. §235.00 as written and construed. They are simply compendia of illustrations depicting largely depersonalized genital manipulations by models of undoubtedly admirable agility representing apparently random variations on the theme suggested by the titles of the magazines.

POINT III

THE FORMER NEW YORK OBSCENITY STATUTE,
PURSUANT TO WHICH THE PETITIONER'S
INDICTMENT AND CONVICTION BY PLEA OF
GUILTY ARE BASED IS CONSTITUTIONAL AS
CONSTRUED IN PEOPLE v. HELLER CONSIDERED
IN THE LIGHT OF MILLER v. CALIFORNIA

On April 28, 1972, the Petitioner was indicted by the Grand Jury of Suffolk County for 207 counts of conspiracy and obscenity. The obscenity charges (obscenity in the first and second degrees) were pursuant to the then effective N.Y.P.L. 235.05 and 235.06, which at that time defined obscenity (N.Y. P.L. 235.00)* as:

Any material or performance is "obscene" if (a) considered as a whole, its predominate appeal is to prurient, shameful or morbid interest in nudity, sex, excretion, sadism or masochism, and (b) it goes substantially beyond customary limits of candor in describing or representing such matters and (c) it is utterly without redeeming social value.

At the time of the indictment (and indeed, the criminal acts charged in the indictment), the prevailing federal constitutional standards for testing allegedly obscene material involved proof of three elements. To be found obscene, the prosecution had to establish that:

* This statute was repealed by L. 1974, ch. 989. See now-effective N.Y.P.L. Section 235.00(1).

- (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex;
- (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and
- (c) the material is utterly without socially redeeming value. Roth v. United States, 354 U.S. 475, 484 (1951); Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966).

As Petitioner apparently agrees, this statute was consistently upheld in light of this standard in collateral federal attacks on its constitutionality relating to overbreadth and vagueness under the Roth-Memoirs standards. Overstock Book Company v. Barry, 305 F. Supp. 842, 849 (E.D.N.Y. 1969); aff'd 436 F. 2d 1289 (2nd Cir. 1970); * Astro Cinema Corp. v. Mackell, 305 F. Supp. 863, 865 (E.D.N.Y. 1969), mod., 422 F. 2d 293 (2nd Cir. 1970); Milky Way Products v. Leary, 305 F. Supp. 288, 295 (S.D.N.Y. 1969), aff'd 397 U.S. 98 (1970), see also, 227 Book Center v. Codd, 381 F. Supp. 1111, 1115 (S.D.N.Y. 1974); DeSalvo v. Codd, 386 F. Supp. 1293, 1300 (S.D.N.Y. 1974).

On June 21, 1973, the Supreme Court in Miller v. California, 413 U.S. 15 (1973), partially revised the three-tiered

* Note should be further made that that case involved the same corporate co-defendant, Overstock Book Company, Inc., as was also involved in the case sub judice on the state level.

Roth-Memoirs test to provide that for material to be found obscene, the basic guidelines to be applied by the triers of fact were:

- (a) Whether 'the average person, applying, contemporary community standards' would find that the work, taken as a whole appeals to prurient interest (citations omitted);
- (b) whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law;* and
- (c) whether the work, taken as a whole lacks serious literary, artistic, political or scientific value."
Miller v. California, supra at 24.

The Court further indicated that while it did not wish to become engaged in creating "regulatory schemes" for state obscenity statutes, it did offer "a few plain examples of what a state statute could define for regulation under part (b)....:

- (a) Patently offensive representation or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
- (b) Patently offensive representation or descriptions of masturbation, excretory functions and lewd exhibition of the genitals.

* Although not relevant in this case it should be noted that Miller also firmly enunciated the principle that "contemporary community standards" and "not national standards were to be applied in determining obscenity." Miller, supra at 30-34.

As is readily apparent, two out of the three standards enunciated in Roth-Memoirs were revised, thus re-formulating the burdens imposed on the prosecution relating to specificity in legislative drafting (Test "b") and the overall standard to be applied in proving allegedly obscene material obscene (Test "c"). However, the Court was careful to point out that even in the light of these newly articulated standards, "[o]ther existing state statutes, as construed heretofore or hereafter, may well be adequate." Miller v. California, supra at 24, n.6; see also United States v. 12 200 Ft. Reels of Super 8 mm Film, 413 U.S. 123, 130 n. 7 (1973) [decided with Miller]

Two days after the Miller decision, the Supreme Court decided Heller v. New York, 413 U.S. 483, (1973), which on a previous appeal to the New York Court of Appeals in 29 N.Y. 2d 312 (1971), the latter court had upheld the constitutionality of the same statute under question here. A majority of five Justices, citing footnote 7 in United States v. 12 200 Ft. Reels of Super 8mm Film, supra at 130 (which indicates that where "serious doubt" is raised as to the vagueness of certain words in obscenity statutes, the Supreme Court was prepared to construe those words as limited to that specific "hard core" pornography enunciated in Miller), vacated the judgment and remanded the case to the New York Court of Appeals for reconsideration in light of Miller.

On remand, the New York Court of Appeals, following the dictates of Miller, determined that N.Y.P.L. 235.00, subd. (1) sufficiently described the conduct sought to be proscribed so as to satisfy any void-for-vagueness attack. Thus, the specific words of the statute, i.e., "nudity", "sex", "excretion", "sadism" and "masochism", were construed "to prohibit conduct that was malum in se in terms of commercial exploitation" in order to simply be "hard core pornography" because it "exceeded the customary limits of descriptive candor". The Court held that P.L. 235.00 subd. 1 had been given and would continue to be given only that narrow application to include "offensive depictions of ultimate sexual acts, masturbation, excretory functions, lewd genital exhibition, i.e., precisely the sort of thing described in the Miller opinion". The Court opined that New York's long-applied obscenity standard, under N.Y.P.L. 235.00 and the previous N.Y.P.L. 1141, the "hard core pornography" test, had consistently been utilized in obscenity prosecutions to be consonant with any specificity requirement now raised in Miller. People v. Heller, 33 N.Y. 2d 314, 327-328. See e.g., People v. Kirkpatrick, 32 N.Y. 2d 17 (1973); People v. G. I. Distributors, Inc., 20 N.Y. 2d 104, cert. denied, 389 U.S. 905 (1967); People v. Fritch, 13 N.Y. 2d 119 (1963); People v. Richmond County News, 9 N.Y. 2d 578 (1961). Since this "hard core pornography" standard had only been applied in New York to include "what is sexually

morbid, grossly perverse and bizarre, without any artistic or scientific purpose or justification," that is, "dirt for dirt's sake" quoting, [People v. Richmond County News, supra at 587], the court held that the statute "more than complies with the Miller limits as written and construed" (People v. Heller, supra at 331). (emphasis added).

On a petition for a Writ of Certiorari before the Supreme Court, the defendants in the companion case decided with Heller, Buckley and Goldstein, argued that the retrospective application of New York's "hard core pornography test" was still void for vagueness in light of Miller, and citing Bouie v. City of Columbia, 378 U.S. 347 (1964), was an unconstitutional ex post facto judicial enlargement of a criminal statute. Buckley v. New York, Petitioner's Brief for a Writ of Certiorari, at 14-15 n. 24, 16. In rebuttal, the Respondent argued that since the New York Court of Appeals is the ultimate arbiter of New York law, it had the authority to construe its own prior decisions and those of other New York Courts to have limited the reach of the New York obscenity statute to fall within the constraints of Miller. Buckley v. New York, Respondent's Brief in Petition for Writ of Certiorari at 8. A majority of five justices (apparently accepting the latter contention) declined to interfere

with the determination of the New York Court of Appeals and thus let stand the statutory constriction in People v. Heller. Buckley v. New York, cert. denied, 418 U.S. 944 (1974).

This decision not to consider the New York Court of Appeals' construction of its own statute, was handed down only one month subsequent to the Supreme Court's opinion in Hamling v. United States, 418 U.S. 87 (1974). There the Court likewise rejected a defendant's contentions that judicial construction of a federal statute banning the mailing of obscene materials, (28 U.S.C. 1461), to fit the Miller specificity requirements was a retrospective ex post facto application of the statute to him. In so doing, the Court opined (in language very similar to that in People v. Heller), that 18 U.S.C. 1461 as construed was actually "limited to the sort of patently offensive representations or descriptions of that specific hard core sexual conduct given as examples in Miller v. California." Thus, this construction was not an ex post facto application which resulted in a deprivation of a right to fair warning resulting from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language; because the Miller enumeration of specific categories of conduct which might be obscene did not for purposes of the statute make criminal

conduct which had not previously been thought criminal, the Court's construction was a mere "clarifying gloss" to prior construction making the statute more definite. Hamling v. United States, supra at 110-116; see Manual Enterprises v. Day, 370 U.S. 478, 483 (1962). The Court further indicated that although Miller arose before the final judgment was entered in the case, since the Miller specificity requirement (as opposed to the ultimate standard of review) "serve[d] to benefit the petitioners [it] must be applied in their case". Hamling v. United States, supra at 102; see also, Marks v. United States, ____ U.S. ____, ____, 97 S. Ct. 990, 994-995 (1977), Jenkins v. Georgia, 418 U.S. 158, 160, 162 (1974).

Finally, on June 9, 1977 (coincidentally, the same day that Petitioner's habeas corpus application was orally argued before the District Court), the Supreme Court in Ward v. Illinois, ____ U.S. ____, 97 S. Ct. 2085 (1977) extended the principle of constitutional construction for pre-Miller obscenity statutes first enunciated in Miller and later in Hamling, supra at 114 to state legislation. Thus, in a case where the defendant had challenged a state obscenity statute (almost identical to former N.Y.P.L. 235.00) on the ground that it failed to conform with Miller

specificity guidelines, the Supreme Court held that the highest court of the state in question had properly construed the statute (in light of a long line of previous state court case law) "as merely being limited to 'the sort of' patently offensive representations or descriptions of that specific hardcore sexual conduct given as examples in Miller." Ward, Illinois supra at ____, 97 S. Ct. at 2091, citing also, United States v. 12, 200 Ft. Reels of Film, supra at 130, n. 7.

On April 2, 1976 the Petitioner pleaded guilty to the crime of Obscenity, in the First and Second Degrees (N.Y.P.L. 235.00, 235.06), in full satisfaction of the 102 remaining counts in the indictment. The remaining 105 counts of the indictment were previously dismissed by order of the County Court, County of Suffolk (Tanenbaum, J.) dated October 17, 1975.

It is respectfully submitted that juxtaposed in this evolution of the present-day constitutional status of obscenity laws in general and in particular, the New York obscenity law in question, the Petitioner's allegation that the former N.Y.P.L. 235.00 is unconstitutional is without substantive merit.

To clarify what is really the major question before this Court, on this issue, the only allegation of improper application of former N.Y.P.L. 235.00 as construed by People v. Heller in light of Miller v. California, concerns its specificity (Test "b" in Miller) in order to give potential defendants fair warning. The Petitioner

maintains (Petitioner Brief at 17-19) and the Respondents agree that the Old Roth-Memoirs standard of review (i.e. "utterly without socially redeeming value"), if it is relevant in this Petition at all, is applicable (See Point, II, Respondent's Brief, *supra*; see e.g. United States v. Theives, 526 F 2d 989 (5th Cir. 1976); United States v. Sherpix, 512 F 2d 1361 (D.C. Cir. 1975; United States v. Groner, 494 F 2d 499 (4th Cir. 1974); former N.Y.P.L. 235.00.

The New York Court of Appeals' construction on remand from the Supreme Court in People v. Heller, *supra*, clearly followed the mandate of the High Court to construe certain otherwise generalized words in obscenity statutes as limited to that specific "hard core pornography" enunciated in Miller (United States v. 12, 200 Ft Reels of Super 8mm Film, *supra* at 130 n. 7) United States v. Hamling, *supra* at 114; Smith v. United States, ____ U.S. ____, ____, 97 S. Ct. 1756 1764 (1977).^{*} In so doing, the highest State Court in New

*

Indeed the Supreme Court in Ginsberg v. New York, 390 U.S. 629, 643 (1966) likewise accepted the New York Court of Appeals' prior construction of an earlier obscenity statute (N.Y.P.L. § 484-h) noting that where it was construed to be "virtually identical to the Supreme Court's most recent statement of the elements of obscenity" [citation omitted]...[that definition gave] 'men in acting adequate notice of what is prohibited' and does not offend due process.' [citations omitted]."

York declared that upon a reading of a long line of pre-Miller cases construing P.L. 235.00, that statute was no broader than it was before June, 1973 and therefore was not rendered invalid by the Miller restrictions of specificity. People v. Heller, supra at 331; See Smith v. United States, ____ U.S. at ____, 97 S. Ct. at 1764 (1977); Ward v. Illinois, supra. That the Court of Appeals indicated that the statute, considered without the benefit of prior construction was facially invalid, is of no moment since the Court was simply following the Supreme Court's explicit declaration that" [o]ther existing state statutes, as construed heretofore or thereafter may well be adequate". Miller v. California, supra at 25, n. 6. Thus, Petitioner's essential argument that because no judicial construction correcting the alleged deficiency of specificity occurred prior to the commission of the acts charged, it was an unconstitutional ex post facto application of the law to him, is specious. N.Y.P.L. 235.00 as declared by the State's absolute arbiter of statutory construction, as construed, always complied with the Miller specificity standards and thus gave fair notice because it did not unexpectedly make conduct criminal which was not previously thought to be criminal. Ward v. Illinois, ____ U.S. ____, 97 S. Ct. 2085, 2090-2091 (1977)

* Indeed the People's Brief in Heller on remand in the Court of Appeals conceded as much. Appellant's Brief People v. Heller, supra, at 29.

United States v. Hamling, *supra*; see also, Smith v. United States, *supra*; United States v. Cutting, 538 F. 2d 835, 838-839 (9th Cir. 1976); United States v. Womack, 509 F. 2d 368 (D.C. Cir. 1974); United States v. Theives, 484 F. 2d 1149, 1155 (5th Cir. 1973), cert. denied; 418 U.S. 932 (1974). Since pursuant to Hamling, a "'defense' to conviction or the affirmance of conviction [based on a lack of fair notice] is not available once the statute has been authoratively construed so as to render it constitutionally acceptable, even if the construction occurred after the original conviction" [McKinney v. Parsons, 513 F. 2d 264, 269-270 (5th Cir), cert. den., 423 U.S. 960 (1975)], in the case sub judice, the fact that this construction occurred prior to the conviction (but after the commission of the acts), renders the Ward-Hamling principle completely applicable, especially where the federal courts have found tenable the New York Court of Appeals' holding that P.L. 235.00 as construed always embodied the constitutionally sufficient definition of obscenity. De Salvo v. Codd, *supra*; 227 Book Center v. Codd, *supra*. The interpretation given to N.Y.P.L. 235.00 by the New York Court of Appeals thus provided the same "clarifying gloss" and not an unforeseen change to the statute the Supreme Court found acceptable in Hamling v. United States, *supra*, and most recently in

Ward v. Illinois, supra. This principle, moreover, is applicable to habeas corpus proceedings. McKinney v. Parsons, supra, at 270.

The Petitioner's citation to several state court opinions which have declared unconstitutional, certain obscenity statutes in light of Miller, [Petitioner-Appellant's Brief at 22], is unpersuasive. While Mr. Brown conveniently omits to cite the many state decisions which have upheld pre-Miller obscenity statutes as in compliance with Miller specificity standards. [E.g., Pierce v. State, 292 Ala. 473 (1974), cert. denied, 419 U.S. 1130 (1975); People v. Enskat, 33 Cal. App. 3d 900, 909-910 (1973), cert. denied, 418 U.S. 937 (1975); Rhodes v. State, 283 So. 2d 351, 354-359 (Fla. 1973); Slayton v. Paris Adult Theater I, 231 Ga. 312, 315-316 (1973), cert. denied, 418 U.S. 939 (1974); State v. Little Art Corp., 215 N.W. 2d 853, 855-856 (Neb. 1974); State ex rel. Field v. Hess, 540 P. 2d 1165 (Okla. 1975); West v. State, 514 S.W. 2d 443 (Tex. Cr. App. 1974); Price v. Commonwealth 201 S.E. 2d 798 (Va. 1974), cert. denied, 419 U.S. 902 (1975)], the respondents most respectfully would rely on those decisions (and of course those federal decisions noted supra), not as substantive case law which this court must follow, but instead, as clear evidence of the widespread judicial approval of the procedure of statutory

construction of pre-Miller statutes delineated in Miller, Hamling, 12, 200 Ft. Reels of Film, and Ward.

Inasmuch as the defendant in Ward, was in the identical position concerning post-Miller application to pre-Miller conduct as the Petitioner is in this case, it is respectfully submitted that that case, as a matter of procedural construction, is controlling. There, in response to the defendant Ward's allegation of no notice of proscribed conduct, in Illinois the Supreme Court looked to prior Illinois decisions and found a long line of pre-Miller cases which established the type of obscene materials the law proscribed; thus, although only generalized proscribed acts were enumerated in the statute, these were considered to be (as in Miller and Hamling v. United States, 418 U.S. 87, 114 [1974] "examples". The statute thus was found constitutionally acceptable because a "needlessly technical and wholly unwarranted" reading of prior statutory construction would not be applied (97 S. Ct. at 2091). Therefore, the Court expressly held that just as in Hamling, the Illinois Supreme Court properly construed its own statute consonant with Miller (in People v. Ridens) as merely being limited to " 'the sort of' patently offensive representations or descriptions of that specific hardcore sexual conduct given as examples in Miller"; citing also, United States v. 12, 200 Ft. Reels of Film, 413 U.S. 123, 130, n. 7 (1973); Ward, supra.

The post-Miller statutory construction to Ill. Rev. Stat. c. 38, §§11-20 in People v. Ridens by the Illinois Supreme Court and approved in Ward was precisely the same statutory construction

applied by the New York Court of Appeals in People v. Heller, 33 N.Y. 2d 314 (1973), cert. denied, sub, nom, Buckley v. New York, 418 U.S. 944 (1974). This state statutory construction, as argued by Respondents in its District Court brief, was exactly what the Supreme Court previously elucidated in principle in Hamling and 12,200 Ft. Reels to be an appropriate judicial response to Miller. Ward was very simply Buckley v. New York, supra, considered on the merits. Former N.Y.P.L. 235.00, as construed, always gave fair and specific notice to defendants of the kind of materials proscribed irrespective of when that clarifying gloss-construction occurred. See, Splawn v. California, ___ U.S. ___ 97 S. Ct. 1987, 1990-1991 (1977).

The respondents would respectfully note that notwithstanding the rather spurious implication that the New York Court of Appeals in Heller relied on but five cases to construe former N.Y.P.L. 235.00 as in compliance with Miller, [Appellant's Brief at 24], the record on appeal in that case indicates that a long line of previous New York case law construing the statute as limited to "hard core" pornography was also considered by the Court. E.g., People v. Bookcase, Inc., 14 N.Y. 2d 409 (1964); People v. Abronovitz, 38 A.D. 2d 631 (4th Dept., 1971), rev'd on other grds, 31 N.Y. 2d 160; People v. Mature Enterprises, 73 Misc. 2d 749 (Cr. Ct. 1973); People v. Morgan, 68 Misc. 2d 667 (Cr. Ct.) aff'd (App. T. 1971); People v. Bercowitz, 61 Misc. 2d 974 (Cr. Ct. 1970); People v. Clarke, 60 Misc. 2d 1073 (Cr. Ct. 1969); People v. Stabile, 58 Misc. 2d 905 (Cr. Ct. 1970); Mishkin v. New York, 383 U.S. 502, 505 (1966); People v. Heller, Appellant's and

Respondent's Briefs; see also, People v. Wendling, 258 N.Y. 451 (1932); People v. Pocketbooks, Inc., 38 Misc 2d 1004 (Co. Ct., Albany Co. 1963) (constructing former N.Y.P.L. 1141); People v. Weingarten, 25 N.Y. 2d 639 (1969); People v. Rothenberg, 20 N.Y. 2d 35 (1967). Moreover, a careful review of those Court of Appeals cases cited in People v. Heller at 327, clearly indicates the consistent and very careful limitation of the concept of obscenity to that required by Miller, i.e., "hard core pornography". See People v. Richmond County News, supra at 586-587; People v. G.I. Distributors, supra at 105; People v. Fritch, supra at 123; People v. Bookcase, supra at 414-415; People v. Kirkpatrick, supra at 27. Thus irrespective of the appellant's implication that People v. G.I. Distributors, supra, was erroneously relied on by the District Court [in that the activities pictured and condemned there were allegedly far broader than in the materials sub judice (Appellant's Brief at 26-27), the proscribed conduct in question was sufficiently enumerated by the New York courts long before the activities herein. Thus, the petitioner's essential contention that Miller required that "the acts themselves be specifically defined", [Petitioner-Appellant's Brief at 26] is patently groundless, as is, of course, well-established now that a state's obscenity law does not have to contain an expressly enumerated encyclopedic listing of all prohibited conduct or portrayals to be constitutional [Ward v. Illinois, supra at , 97 S. Ct. at 2089-2091; Miller v. California, supra at 24, n. 6; Miller v. California II, 418 U.S. 915 (1974); Watkins v. South Carolina, 418 U.S. 911 (1974)] (latter two cases, appeal dismissed). The appellant's logomachical

analysis of the term "hard core" [Appellant's Brief at 26], it is respectfully submitted, is also without basis. The term "hard core" as a convenient phrase of art indicating that specific sort of proscribed conduct the statute always encompassed must be read in conjunction with the long line of New York cases which has, prior to Miller, narrowly construed it. As such, the petitioner was sufficiently put on notice as to the type of materials circumscribed by the statute as it applied to his conduct.

Finally, it is respectfully submitted that for the purpose of determining whether a statute lacks specificity so as to be unconstitutionally vague, this Federal Court should consider the statute in question precisely as the State's highest court has construed it and must view claims of indefiniteness in that light. See e.g., Jurek v. Texas, ____ U.S. ____ 96 S. Ct. 2950, 2956, n. 7 (1976); O'Brien v. Skinner, 414 U.S. 524, 531 (1974); Wainwright v. Stone, 414 U. S. 21, 23 (1973); Gooding v. Wilson, 405 U.S. 518, 520, 525, n. 3 (1972); United States v. Thirty-Seven Photographs, 402 U.S. 363, 369 (1971); DeSalvo v. Codd, supra; see also, Stone v. Powell, ____ U.S. ____ 96 S. Ct. 3037, 3051, n. 37 (1976). Thus, this Court in reviewing that action of the New York Court of Appeals has a duty to construe former N.Y.P.L. 235.00 as constitutional if at all possible [Erznoznik v. City of Jacksonville, ____ U.S. ____ 95 S. Ct. 2268 (1975); United States v. Vuitch, 402 U.S. 62 (1971); United States v. Crosson, 462 F. 2d 96 (9th Cir. 1972), cert. denied, 409 U.S. 1064 (1973) and in so doing in this habeas corpus proceeding, must apply

the presumption of constitutionality to this state prosecution. See U.S. ex rel. Williams v. Preiser, 497 F. 2d 337 (2nd Cir.), cert. denied, 419 U.S. 1058 (1974). Where New York's highest court in Heller authoratively considered and rejected the precise question raised by Petitioner [People v. Heller, supra at 331; Respondent's Brief, People v. Heller, supra at 4], and moreover, where the same question was argued in and implicitly rejected by the Supreme Court in Ward v. Illinois, supra, and indeed, in Buckley v. New York, 418 U.S. 944 (1974) (see Respondent's Brief, supra), the District Court correctly determined that former N.Y.P.L. 235.00 as construed, always embodied the constitutionally sufficient definition of obscenity.

In sum, the former New York Obscenity Statute (N.Y.P.L. 235.00) pursuant to which the petitioner's indictment and conviction by plea of guilty are based is constitutional as construed in People v. Heller considered in the light of Miller v. California, in that although this construction occurred subsequent to the indictment but prior to the guilty plea, this construction was merely a "clarifying gloss" of what was a long established concept of the definition of obscenity as applied to the petitioner, in New York. Hamling v. United States, supra; Ward v. Illinois, supra.

CONCLUSION

ON THE BASIS OF THE FOREGOING,
THE DISTRICT COURT DENIAL AND
DISMISSAL OF THE PETITION FOR
A WRIT OF HABEAS CORPUS SHOULD
BE AFFIRMED.

Dated: Riverhead, New York
December 12, 1977

Respectfully submitted,

HENRY F. O'BRIEN
District Attorney of
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Assistant District Attorneys
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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
) SS:
COUNTY OF SUFFOLK)

Rosanne Profeta, being duly sworn, deposes
and says:

That on the 13th day of December, 1977, she
served the within Respondent's Brief
upon the defendant, ROBERT BROWN
through his attorney RHODES, BAKER & FISHER, ESQS.
by depositing a true copy of same securely enclosed in a postpaid
wrapper in the post office letterbox, official depository maintained
and exclusively controlled by the United States, at Criminal Courts
Building, Center Drive South, Riverhead, New York, 11901, directed
to said defendant's attorney, RHODES, BAKER & FISHER, ESQS.
at 16 Court Street, Suite 1210, Brooklyn, New York 11241
that being the address within the State designated by him for that
purpose upon the preceding papers in this action, or the place
where he then kept an office between which places there was and
now is a regular communication by mail.

Deponent is over the age of eighteen (18) years.

Rosanne Profeta
Rosanne Profeta

Sworn to before me this

13th day of December, 1977.

Christine Repp
NOTARY PUBLIC
CHRISTINE REPP

NOTARY PUBLIC, State of New York
No. 52-4632648 Suffolk County
Commission Expires March 30, 1978

